IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.09.2023

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.6176 of 2023 & 8148 of 2021
and
W.M.P.Nos.6184 of 2023 & 8710 of 2021

M/s.Suzlon Energy Limited,
Represented by Umesh Shripad Apte,
No.5, Shrimali Society,
Near Shri Krishna Complex,
Navrangpura,
Ahmedabad - 380 009. ... Petitioner in both WPs

Vs

1.The Principal Commissioner of Customs (Adjudication),
Mumbai, 2nd floor, Old Building,
New Custom House, Ballard Estate,
Mumbai – 400 001. ... Respondent in WP.No.6176 of 2021

2.The Customs, Central Excise & Service Tax Settlement Commission,
60, Rajaji Salai, II Floor, Narmada Block,
Custom House,
Chennai - 600 001.

3.The Commissioner of Customs,
Chennai-II Commissionerate,
60, Rajaji Salai, Custom House,
Chennai – 600 001.

4.The Additional Director
General (Adjudication),
2nd Floor, Old Building,
New Custom House,
Ballard Estate,
Mumbai – 400 001. ... Respondents in both WPs

Prayer in W.P.No.6176 of 2023 : Writ Petition filed under Article 226 of the Constitution of India, Writ of Certiorarified Mandamus, to call for the entire records relating to Order No.07/SJ(07)/PCC(ADJN.) Mumbai/2022, dated 30.11.2022 of the first respondent and quash the same and consequently direct the first respondent to await the outcome of W.P.No.8148/2021 as prayed for by the petitioner in his letter dated 10.11.2022.

Prayer in W.P.No.8148 of 2021 : Writ Petition filed under Article 226 of the Constitution of India, Writ of Certiorarified Mandamus, to call for the entire records relating to Order No.01/2021 issued from file F.No.S.A.Cus/20/2020-SC, dated 01.01.2021 of the first respondent and quash the same and consequently direct the first respondent to accept the application of the petitioner.

For Petitioner (in both WPs)	:	Mr.T.Ramesh
For Respondents (in W.P.No.6176/2023)	:	Mr.V.Sundareswaran for R1 and R2 Senior Panel Counsel
	:	Ms.Anu Ganesan for R3 Junior Panel Counsel
For Respondents (in W.P.No.8148/2021)	:	Ms.Anu Ganesan for R1 and R2 Junior Panel Counsel
	:	Mr.V.Sundareswaran for R3 Senior Panel Counsel

COMMON ORDER

By this common order, both these writ petitions are being disposed of.

2. In W.P.No.8148 of 2021, final order dated 01.01.2021 passed by the first respondent in Settlement Application No.SA(CUS)20/2020-SC has been challenged. Settlement Application No.SA(CUS)20/2020-SC was filed by the petitioner on 07.07.2020 before the first respondent. The said application was filed by the petitioner after the third respondent namely the Additional Director General (Adjudication) had investigated and had issued a Show Cause Notice dated 30.11.2022 to the petitioner

calling upon the petitioner to Show Cause as to why disputed Anti Dumping Duty (ADD) and Countervailing Duty (CVD) should not be demanded from the petitioner for the imports made by the petitioner from the Republic of China without payment of the appropriate duties in contravention of Notification No.1/2016-CUS(CVD) dated 19.01.2016 and Notification No.42/2017-Cus (ADD) dated 30.08.2017.

3. The application filed by the petitioner before the first respondent Settlement Commission on 07.07.2020 was also admitted and therefore orders came to be passed under Section 127C(1) of the Customs Act, 1962 on 23.07.2020 and on 17.12.2020.

4. The petitioner had also earlier filed an application before the Settlement Commission for settling the dispute under Chapter XIV-A of the Customs Act, 1962 on 30.09.2011 in respect of tax liability on inclusion of license fees in the transaction value of import of SAP. The Settlement Commission had then accepted the application and settled the case of the petitioner vide its order dated 30.09.2011.

5. It is the case of the petitioner that having accepted the application dated 07.07.2020 filed by the petitioner vide order dated 23.07.2020 and 17.12.2020, it was not open for the first respondent Settlement Commission to reject the application filed by the petitioner under Section 127(1)(i) of the Customs Act, 1962.

6. It is submitted that the sting under Section 127L(1)(i) of the Customs Act, 1962 was not attracted as no penalty was imposed on the petitioner for concealment of particulars of the duty liability before the Settlement Commission when order dated 30.09.2011 bearing reference F.No.59/Cus/RPB/SC(M)2011 was passed in the earlier round in SA(C) 162/2011.

7. It is therefore submitted that having accepted the application filed by the petitioner and proceeded further in terms of Section 127C(1) of the Customs Act, 1962, the bar under Section 127L(1)(i) of the Customs Act, 1962 was not available.

8. In W.P.No.6176 of 2023, the petitioner has challenged the impugned Order-in-Original No.7/SJ(07)/PCC(ADJN) dated 30.11.2022 passed by the first respondent therein namely the Principal Commissioner of Customs (Adjudication) Mumbai.

9. It is submitted that the order was passed despite undertaking being given by the counsel before this Court in W.P.No.8148 of 2021 that proceedings initiated in Show Cause Notice bearing F.No.DRI/CRU/VIII/26/7/2018 dated 27.11.2019 will not be proceeded. In view of Challenge to order dated 01.01.2021 in S.A.CUS/20/2020 in W.P.No.8148 of 2021 and Show Cause Notice dated 13.01.2020 bearing reference No. F.No.CAU/DRI/CRU/78/2019-CAU-II.

10. On merits, the learned counsel for the petitioner would submit that the petitioner is a reputed manufacturer of Wind Operated Electric Generators (Wind Mills). It is submitted that the petitioner imported several casting components and Gear Box etc. It is submitted that as far as import of castings in concerned, the petitioner had paid both

Additional Countervailing duty (CVD) and Anti-Dumping Duty (ADD) under the above mentioned Notifications.

11. It is further submitted that the Gearbox was not liable to the aforesaid CVD and ADD.

12. It is submitted that the petitioner opted to settle the dispute under Chapter XIV-A of the Customs Act, 1962. That apart, the learned counsel for the petitioner would submit that the disputed tax duty and interest has been paid to buy peace with the Department. It is submitted that the petitioner had filed application under Chapter XIV-A of the Customs Act, 1962 before the Settlement Commission only to purchase peace from the Department, as far as imposition of penalty under Section 112(a)/114A and 114AA of the Customs Act, 1962 and for waiver the proposed confiscation of imported goods under Section 111(m) of the Customs Act, 1962.

13. It is further submitted that the above amount together with the interest was paid on 28.11.2018 much prior to the issuance of the Show

Cause Notice dated 27.11.2019. It is therefore submitted that the impugned order is liable to be quashed. The impugned order is passed by the first respondent/Settlement Commission in W.P.No.8148 of 2021 and the third respondent in W.P.No.6176 of 2023 (second respondent in W.P.No.8148 of 2021) are therefore liable to be quashed.

14. Defending the impugned order, the learned counsel for the respondent submits that the respondent namely the Settlement Commission and the Principal Commissioner of Customs (Adjudication) was passed the impugned Order-in-Original No.07/SJ (07)/PCC (ADJN) Mumbai/2022 dated 30.11.2022.

15. It is submitted that the order of the Settlement Commission cannot be interfered with. It is submitted that the law on the subject is clear. A reference is made to the decision on the following four decisions:-

> “(i)***Country Club Hospitability and Holidays Limited*** Vs. ***Union of India*** [2018 (16) G.S.T.L 384 (Bom);
> (ii)***C.P.Re-Rollers Limited*** Vs. ***Union of India*** [MANU/WB/0765/2015;

(iii)***Commissioner of Commercial, Excise and Service Tax, Durgapur*** Vs. ***Ankit Metal and Power Limited*** [2019 (365) E.L.T 870 (Cal) and

(iv)***M/s.K P Manish Global Ingredients Private Limited, Represented by its Director, P.Manish Jain*** Vs. ***Customs, Central Excise and Service Tax Settlement Commission, Additional Bench, Chennai, The Commissioner of Customs (Chennai – II)*** [2023 TIOL 534 HC MAD CUS]."

16. It is specifically submitted that there is a clear embargo under Section 127L(1)(i) of the Customs Act, 1962. It is submitted that if an applicant had approached a Settlement Commission on an earlier occasion and penalty is imposed while settling the dispute on the ground of concealment of particulars of the duty liability, such applicant is barred from approaching the Settlement Commission for the second time.

17. Specifically, it is submitted that the scheme of the provisions indicates that a person may approach the Settlement Commission once for having concealing the particulars of duty payable. However, having exercised, such option, such an option to approach the Settlement Commission are closed forever, if Settlement Commission imposes penalty for concealment of duty. The learned counsel for the second and

third respondents in the respective writ petitions have drawn attention to the order passed by the Settlement Commission on 30.09.2011 in Settlement Application No.F.No.59/Cus/RPB/SC(M)2011 vide final order No.112/Final Order/CUS/RPB/2011. A specific reference is made to para 6.3 of the said order reads as under:

> "6.3. For undervaluation of the subject softwares by not including the value of the licence fee, the said Softwares are liable to confiscation under Section 111(m) of the Act and the applicant is held liable to pay penalty under Section 112(a)/114 A of the Act. However, considering the fact that the applicant made a true and full disclosure of the facts and their duty liability, paid the same promptly and fully cooperated during the course of investigation as well as during settlement proceedings, they deserve leniency."

18. The Settlement Commission had imposed a penalty of Rs.10,000/- on the petitioner. It is therefore submitted that the impugned order dated 01.01.2021 passed by the Settlement Commission in S.A.Cus/20/2020-SC does not warrant interfere as the petitioner was barred under law from approaching the Settlement Commission for the second time.

19. That apart, it is submitted that merely because the application was admitted *ipso facto* would not mean that the Settlement Commission was bound to settle the dispute if during the course of the proceedings, the Settlement Commission comes to a conclusion that the application was itself barred under law under Chapter XIV-A of the Customs Act, 1962.

20. The learned counsel for the third and fourth respondents in the respective writ petitions reiterate the above submissions. Specifically, they drew attention to the decision of the Calcutta High Court and of this Court referred to supra.

21. The learned counsel for the respondent further drew attention to the proceedings dated 18.12.2020 of the first respondent Settlement Commission in respect of the proceedings held on 17.12.2022.

22. Specifically, it is submitted that the first respondent Settlement Commission had questioned whether the details of 2011 application were part of the application, for which the consultant had replied in the

negative. It is submitted that a copy of the order passed by the first respondent Settlement Commission on 30.09.2011 was not furnished earlier and therefore the consultant was asked to furnish a copy of the same and it is only thereafter it became evident that the application was barred and therefore the impugned order was passed on 01.01.2021 in S.A.Cus/20/2020-SC. Therefore, it is submitted that the impugned order dated 01.01.2021 passed by the first respondent Settlement Commission challenged in W.P.No.8148 of 2021 does not merit interference.

23. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondents.

24. The petitioner had no doubt had approached the Settlement Commission on an earlier date vide Application dated 01.07.2011 vide Apl.No.F.No.59/Cus/RPB/SC(M)2011. The Settlement Commission had accepted the case of the petitioner vide its order dated 30.09.2011 bearing reference No.112/Final Order/CUS/RPB/2011. Operative portion of the said order reads as under:-

"6.<u>Findings of the Bench :</u>

6.1 The Bench has carefully examined the case records including the submissions made by the applicant and the Revenue during the cours of personal hearing.

6.2 It is observed that the applicant has admitted and paid the entire additional duty liability alongwith interest as demanded in the SCN. **However, they pleaded that they have placed an order of impugned Software with SAP India who in turn placed an order with M/s.SAP AG Germany and the softwares were imported by M/s.SAP India and the applicant was unaware about it and should not be held as importer and no fine or penalty should be imposed on them. It is seen from the records that M/s.SAP AG Germany had sent the CD through Courier Company M/s.DHL who had the courier Bills of Entry. The applicant was all along shown as the consignee and they took the delivery of the goods. Therefore, they cannot absolve themselves of the responsibility as importer of the impugned goods.** It is also observed that the applicant had never disclosed to the department about the payment of the licence fee paid by them without which the imported Software would have been of no use. Since the Software cannot be disassociated from "the right to use" for which licence fee was paid, the licence fees could not have been paid in isolation of the use of the Software. Therefore, the value of the licence was rightly includable in the transaction value of the impugned Software in terms of Rule 9(1)(c) read with Rule 4 of the Customs Valuation Rules, 1988.

6.3.For undervaluation of the subject Softwares by not including the value of the licence fee, the said Softwares are liable to confiscation under Section 111(m) of the Act and the applicant is held liable to pay penalty under Section 112(a)/114A of the Act. **However, considering the fact that the applicant made a true and full disclosure of the facts and their duty liability, paid the same promptly and fully co-operated during the course of investigation as well as during settlement proceedings, they deserve leniency.**

7. In view of the foregoing discussions, the following terms and conditions are laid down under Subsection (5) of Section 127 C of the Customs Act, 1962 for settlement of this case.

Orders

Customs Duty : The Customs duty is settled at Rs.4,58,074/- (Rupees Four Lakhs Fifty Eight Thousand Seventy Four Only). This amount has been paid by the applicant and confirmed by the Revenue.

Interest : Interest is settled at Rs.3,09,535/- (Rupees Three Lakhs Nine Thousand Five Hundred & Thirty Five Only). This amount has also been paid by the applicant and confirmed by the Revenue.

Fine : Payment of fine is not attracted since the goods are not physically available for confiscation under the Customs Act, 1962.

Penalty : A Penalty of Rs.10,000/- (Rupees Ten Thousand Only) is imposed on the applicant. Immunity is granted to the applicant from payment of penalty in excess of this amount.

Prosecution : The applicant is granted immunity from prosecution under the Customs Act, 1962, in so far as this case is concerned.

> 8. The above immunities are granted under sub-section(1) of Section 127H of the Act attention of the applicants are also invited to the provisions of Sub-section(2)(3) of Section 127H.
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> 9. This order of settlement shall be void in terms of sub-section(8) of Section 127 C of the Act, if the Settlement Commission subsequently finds that it has been obtained by fraud or misrepresentation of facts.
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> 10. A copy of this order is given to the applicants and co-applicant herein and to the jurisdictional Commissioner for their use in the implementation of this order. No one should use this order in any other manner or for any other purpose without the written permission of this Commission.
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> 11. It is observed that there are two other notices, namely, M/s.SAP India Systems and M/s.DHL Express(India) Private Limited to the subject SCN who have not made application for settlement of the case against them. The Revenue may take necessary action, as deemed fit, against them in terms of the show cause notice.
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> 12. All concerned are informed accordingly."

25. A reading of the above order indicates that the Settlement Commission accepted that there was no direct import of the software by the petitioner. Although the petitioner had placed an order of impugned software with SAP India who had inturn placed an order on M/s.SAP AG Germany. The order also records that the software was imported by SAP

India and the Bill of Entry was filed by SAP India. In the Bill of Entry, the petitioner was shown as the consignee.

26. At the time, when the order that was passed by the Settlement Commission on 30.09.2011, the law on the subject was not clear as to whether the petitioner was required to include the value of the software imported separately. Purchase order was placed on the counter part of the foreign exporter from Germany in India by the Indian Wing of said foreign exporter. The order that was passed by the Settlement Commission has upheld the inclusion of the value of the software in terms of Rule 9(1)(C) read with Rule 4 of the Customs Valuation Rules, 1988. The Settlement Commission has not come to an conclusion that the petitioner had resorted concealment of duty liability. The Settlement Commission in its order dated 30.09.2011, at the same time concluded that the petitioner had never disclosed of the department about the payment of the license fee for the software imported by SAP India from their headquarters M/s.SAP AG Germany. The Bill of Entry was filed by SAP India and not by the petitioner.

27. The bar under Section 127L(1)(i) will apply only if penalty was imposed by the Settlement Commission on the ground on concealment of particulars of the duty liability in the earlier round. The Settlement Commission while passing the order dated 30.09.2011 has not categorically concluded that the petitioner has concealed the duty liability.

28. The Settlement Commission had merely concluded that M/s.SAP AG Germany had sent the CD through Courier Company M/s.DHL along with Bills of Entry. Reference to Bills of Entry perhaps refers to Bills of lading. It has concluded that the petitioner was only the consignee. Although as a consignee, the petitioner would be an importer within the meaning of Section 2(26) of the Customs Act, 1962, it has not concluded that the petitioner had filed the Bill of Entry.

29. The petitioner had not resorted to concealment of particulars of his duty liability. Therefore, a nominal penalty of Rs.10,000/- was imposed on the petitioner by the Settlement Commission. Imposition of penalty of Rs.10,000/- is not towards any particular violations of

provisions of the Customs Act, 1962 by the petitioner. The penalty that was imposed on the petitioner appears to be more in nature of a general penalty and is not specific to any particular provisions of the Customs Act.

30. The order of the Settlement Commission also records that the petitioner had made true and full disclosure of facts and their liability and had paid the customs duty and co-operated during the course of investigation as well as during the settlement proceedings and therefore they deserved leniency.

31. Thus, from a reading of above decision of the Settlement Commission in the earlier round vide Final Order No.112/Final Order/CUS/RPB/2011 order dated 30.09.2011 in Settlement Application No.F.No.59/Cus/RPB/SC(M)2011, it cannot be stated that the doors of the petitioner to approach the Settlement Commission for the second time was barred.

32. The imposition of penalty on the petitioner was not on account of concealment of particulars of his duty liability before the proceedings before the Settlement Commission. Therefore, the second application under Section 127L(1)(i) was not barred.

33. In the present case also the petitioner has paid the disputed tax and the interest covered by the Show Cause Notice No.F.No.DRI/CRU/VIII/26/7/2018-CBE dated 27.11.2019 on 28.11.2018 after the investigation were started by the third/fourth respondent in the respective writ petitions. The Settlement Commission ought not to have rejected the application filed by the petitioner for settling the dispute vide Apln.No.S.A.(C)20/2020-SC dated 07.07.2020.

34. In view of the above, the impugned order passed by the first respondent/Settlement Commission in W.P.No.8148 of 2021 is liable to be quashed with consequential relief.

35. In view of the order passed in W.P.No.8148 of 2021, the impugned order passed in Order-in-Original No.07/SJ (07)/PCC (ADJN) Mumbai/2022 dated 30.11.2022 impugned in W.P.No.6176 of 2023 is also liable to be quashed and the case is remitted back to pass consequential order. Consequently, the case is remitted back to the first respondent in W.P.No.8148 of 2021 to pass appropriate orders for issuing necessary certificates under Chapter XIV-A of the Customs Act, 1962 to settle the case of the petitioner in respect of 81 Bills of Entry for imports made by the petitioner between 2016 September to 2018 September from Chennai Port.

36. These writ petitions stand allowed. No costs. Consequently, connected writ miscellaneous petitions are closed.

21.09.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No
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To
1.The Principal Commissioner of
Customs (Adjudication),
Mumbai, 2nd floor, Old Building,
New Custom House, Ballard Estate,
Mumbai – 400 001.

2.The Customs, Central Excise & Service
Tax Settlement Commission,
60, Rajaji Salai, II Floor, Narmada Block,
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